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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1917

IN RE HARLAN H. ROBB

ON APPEAL FROM THE SUPREME COURT

OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, the State of New Hampshire, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Hampshire on the grounds that the decision below is correct, the question presented is not so substantial as to warrant further argument and for want of a properly presented substantial federal question.

STATEMENT

This is a direct appeal from a final judgment denying appellant's motion for rehearing, entered March 31, 1976 by the Supreme Court of the State of New Hampshire.

On December 20, 1973, Harlan H. Robb entered a plea of not guilty by reason of insanity to the charge of murder in the first degree having been indicted by a properly called Grand Jury. Subsequent to a full hearing concerning Mr. Robb's mental state at the time of the alleged murder and at the time of the hearing, he was committed to the New Hampshire Hospital

". . . for life until, or unless, earlier discharged. . . ."* Mr. Robb was committed on December 21, 1973, and remains at the hospital at the present time.

Pursuant to the authority of New Hampshire Revised Statutes Annotated (RSA) Chapter 8, (as amended) the State of New Hampshire sought reimbursement from the assets of Mr. Robb, for his care, treatment and maintenance provided by the State through the New Hampshire Hospital. Appellant, as conservator of Mr. Robb's estate requested instructions from the Probate Court concerning his liability as conservator for the payments due, and upon agreement of all parties, the matter was transferred to the Supreme Court of the State of New Hampshire for ruling. The question presented to that Court was:

> Pursuant to RSA Chapter 8 (as amended), can the State of New Hampshire recover from a person or his estate, expenses for board and care furnished to said person by the State of New Hampshire during said person's commitment to the New Hampshire Hospital pursuant to order of the Superior Court upon acceptance by the State and the Court of a plea of not guilty by reason of insanity to a charge of first degree murder?

In their decision dated February 27, 1976, *In re Harlan H. Robb*, 116 N.H.____, 354 A.2d 408, set forth in full in Appendix A to appellant's Jurisdictional Statement, the Court held that Mr. Robb's obligation to reimburse the State for care, maintenance and treatment did not violate his constitutional right to equal protection of the law, for reasons set forth *In the Matter of John H. Sargent*, 116 N.H. ____, 354 A.2d 404, decided on the same day.

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*The full text of the Order of the Superior Court is as follows:
"The Court is of the opinion and so finds that it would be dangerous for Harlan H. Robb to go at large. It is therefore considered by the Court that the said Harlan H. Robb be committed to the New Hampshire Hospital for life until, or unless, earlier discharged, released or transferred by due course of law, however, he shall not be released, paroled, discharged or otherwise permitted to depart from the physical custody or facilities of the New Hampshire Hospital, either temporarily or permanently, except on order of the Superior Court."

Neither the language of the question transferred and answered by the Court nor the Court's opinion in *Robb* provide the reader with the specific allegations made in support of appellant's equal protection challenge. In the *Sargent* opinion, also set forth in full in Appendix A to appellant's Jurisdictional Statement, the Court noted that they were faced with an equal protection argument based on discrimination between those committed directly to the hospital and those comitted first to the prison and then transferred to the hospital. In holding that RSA Chapter 8 (as amended) required reimbursement from all patients at the hospital, even those first committed to the prison then transferred to the hospital, the Court found no denial of equal protection.

Appellant moved for rehearing in *Robb*. This motion was denied at which time the Court issued a modification of their opinion in *Sargent*. This modification is set forth in Appendix A to the Jurisdictional Statement.

ARGUMENT

A. THE QUESTION PRESENTED IS NOT SUBSTANTIAL

The question raised by this appeal is clearly not so substantial as to warrant further review by this Court. In his Jurisdictional Statement, appellant, in support of the contention that his question presented is substantial, cites a number of cases in which an equal protection challenge was raised and decided. As will appear from the following discussion, however, none of these cases deals with an enforceable obligation upon assets of inmates committed to mental institutions, either through criminal process or conventional civil commitment.

In *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), the Court was faced with a statutory scheme in which a state sought reimbursement for costs of appeal transcripts from one group of convicted indigents who had been unsuccessful on appeal, but not from another group of convicted indigents who had also been unsuccessful on appeal. Both groups enjoyed the benefit of having transcripts for appeal purposes but the obligation to make reimbursement for the cost of the transcript only attached to those who were incarcerated. The financial obligation imposed by the challenged statute was unrelated to the cost of incarceration and the Court found that a rational relation between the classification and the espoused public purpose, essential to support the classification, did not exist.

In both *Levy* v. *Louisiana*, 391 U.S. 68 (1968), and *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), the Court was asked to decide whether the denial to illegitimate children of certain rights enjoyed by legitimate children, was reasonably related to and served a valid public interest. The Court found an absence of a legitimate public interest in both cases and a resulting denial of equal protection.

In the case relied on by appellant as bearing on issues similar to those in the present case, the United States District Court for the District of Connecticut was faced with a statutory scheme which imposed a financial obligation for treatment received at a state hospital, on a certain group of males transferred from jail to the hospital, while not imposing the same obligation on females nor males transferred to the hospital from other correctional institutions. *McAuliffe* v. *Carlson*, 377 F. Supp. 896 (1974). Clearly this situation is not similar to that presented in this appeal.

New Hampshire Revised Statutes Annotated (RSA) Chapter 8 Section 43 provides in part that

> . . . the state is entitled to recover the expense of care, treatment and maintenance of *any* patient or inmate at any of the institutions named in RSA 8:40 . . . if of sufficient ability to pay. . . . [emphasis added]

The New Hampshire Hospital is an institution named in RSA 8:40. Pursuant to RSA 8:43, all patients at the hospital incur the same financial obligation, regardless of the method of becoming a patient. On its face, and unlike the statutes challenged in *Rinaldi*, *Levy*, *Weber*, and *McAuliffe*, RSA 8:43 does not discriminate between those similarly situated.

The legislature has made no distinction between those persons committed under RSA 607:3 (reenacted as RSA 651:9) and those committed under conventional civil commitments by a probate court. This is a valid exercise of the discretion vested in the legislature. *See Kaiser* v. *State*, 80 Kan. 364, 102 P. 454 (1909); *State* v. *Romme*, 93 Conn. 571, 107 A. 519 (1919); cf. *Kough* v. *Hoehler*, 413 Ill. 409, 109 N.E.2d 177 (1952); *Department of Mental Hygiene* v. *Kirchner*, 60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964); *vacated on other grounds*

and remanded, 380 U.S. 194, *on remand*, 62 Cal. 2d 586, 43 Cal. Rptr. 329, 400 P.2d 321; Annot., 20 A.L.R.3d 363, 368. Appellant asks that this Court rule RSA 8:43 inapplicable to persons committed to the hospital pursuant to RSA 651:9. Such a holding would result in one group of patients, those committed through civil process, bearing a financial obligation that another group, those committed pursuant to RSA 651:9, would not have in spite of the fact that they all received the same care, treatment and maintenance. This would appear to be prohibited by the reasoning set forth in *McAuliffe* v. *Carlson*.

Appellant's argument that all individuals committed pursuant to RSA 607:3 and its successor RSA 651:9, are similarly situated is simply not supported by the facts. RSA 8:43 does not deal with commitment pursuant to RSA 607:3, its successor RSA 651:9, or any other provision of the law. Rather it deals with patients at the hospital and their financial obligation to the State for care, maintenance and treatment received at the hospital. It is true that all persons committed pursuant to RSA 607:3 and RSA 651:9 which provides in part that

> . . . the [superior] court, if it is of opinion that it will be dangerous that such person should go at large, may commit him to the prison or to state hospital. . . .**

have certain characteristics in common. But, the prison is a penal institution. It was not designed to provide programs of extensive psychiatric analysis and treatment whereas the hospital has been developed and is continuing to develop with just that purpose in mind. To be more specific, there are no psychologists on the prison staff and there are only two visiting psychiatrists who are available for a total of about one day per week but who do not usually consult with or treat the patients

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**As a practical matter, commitments under this authority have been to the hospital except in those case in which the court concludes that the additional security afforded at the prison is necessary for the protection of the person and the public.

In 1975, RSA 651:9a was enacted. This section, which provides that commitment shall be to the hospital, not to the prison *or* hospital, shall take effect and RSA 651:9 shall be repealed upon certification by the superintendent of the New Hampshire Hospital that the forensic psychiatric unit building and equipment are completed and placed in operation. [Laws of 1975, Chapter 388, Section 8]

presently committed to the prison. Contrast this to the daily contact with psychologists, review and analysis by psychiatrists and the group therapy and other programs designed to lead to a gradual return to society available at the hospital, and it becomes obvious that those committed to the prison and those committed to the hospital are not similarly situated.

A person committed to the prison, where psychiatric and psychological treatment programs for the mentally ill are minimal and generally available only on an emergency basis, does not receive the same benefits the patient at the hospital receives. Furthermore, to charge one group of individuals at the prison for the same care and maintenance all other groups at the prison receive free would arguably constitute dissimilar treatment of those similarly situated.

In *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528,533, (1973) this Court held that

> [u]nder traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. [citations omitted]

Thus the Fourteenth Amendment does not deny to states the power to treat different classes of people in different ways. *Reed* v. *Reed*, 404 U.S. 71, 75 (1971); *Rinaldi* v. *Yeager*, 384 U.S. 305,309(1966).

Clearly, then, the legislature's determination that it is more desirable and beneficial to be committed to the hospital than to the prison is supported by the facts. *In the Matter of John H. Sargent* 116 N.H.____, 354 A.2d 404 (1976). It is also clear that the holding of the Supreme Court of the State of New Hampshire that there is a rational basis for not charging those confined to the prison pursuant to RSA 607:3 or its successor RSA 651:9 while imposing a financial obligation on those committed to the hospital through the same process, is supported by the law. *Id.; see State* v. *Clinch*, 108 N.H. 302, 234 A.2d 814 (1967).

B. THE RECORD DOES NOT AFFIRMATIVELY DEMONSTRATE THAT THE FEDERAL QUESTION WAS PRESENTED TO AND DECIDED BY THE STATE COURT

It has been well established that this Court will not decide federal constitutional issues raised before it for the first time on

review of state court decisions. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

In their opinion, the Supreme Court of the State of New Hampshire ruled against appellant's contention that the attempt by the State to recover expenses for board and care furnished at the New Hampshire Hospital during a person's commitment there pursuant to an order of the Superior Court violates that person's constitutional right to equal protection of the law. The specific discrimination alleged by appellant in support of his equal protection argument does not appear in either the question transferred nor in the court's opinion, but the court does note that appellant's arguments had been decided adversely to him *In the Matter of John H. Sargent*, decided the same day.

In that opinion, the court stated that they were faced with the contention that application of RSA 8:43 violates the constitutional guarantee to equal protection of the laws since in its operation, it discriminates against those criminally incarcerated at the hospital in extracting the cost of commitment at the hospital while not doing so for those first committed to the prison and then transferred to the hospital. In finding no denial of equal protection, the court held that all patients at the hospital, whether committed directly or by way of the prison, would be treated equally because they were all patients within the meaning of RSA 8:43. It is clear from a careful review of that decision, as modified by the court upon denial of appellant's motion for rehearing, that the question presented by appellant in this appeal was not properly presented below and is not now a properly presented federal question.

In support of jurisdiction, appellant includes certain excerpts from his brief before the state court as Appendix C. But this Court has held that briefs and oral arguments before state courts cannot be used to establish that a federal question was raised. *Live Oak Ass'n.* v. *R.R. Commission*, 269 U.S. 354, 357-8 (1926); *Lynch* v. *New York*, 293 U.S. 52, 54 (1934). Under the circumstances, this appeal should be dismissed for want of a properly presented substantial federal question.

C. THIS APPEAL IS OF DOUBTFUL VALUE AS A PRECEDENT

Appellant contends that the question presented is substantial. He does not, however, allege, nor give any evidence to

support a finding of broad precedential value. The Jurisdictional Statement is conspicuously silent with respect to criminal commitment schemes in other jurisdictions and with respect to conflicting decisions in this or other jurisdictions, the presence of which might indicate a need for clarification. Indeed, in New Hampshire, the legislature has already finalized the steps which will shortly result in the termination of the use of the prison as a maximum security holding area for the most dangerous of those committed pursuant to RSA 651:9. When the forensic unit is completed, not only will commitments to the prison terminate, but those already committed to the prison will be transferred to the hospital where they too will benefit from the treatment available there. For these reasons, this case would not have broad precedential value.

CONCLUSION

Appellee respectfully submits, therefore, that the appellant presents no substantial federal question, properly presented below, for review by this Court, and that this appeal should be dismissed or, in the alternative, that the judgment and decree of the Supreme Court of the State of New Hampshire should be affirmed.

Respectfully submitted,

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Attorney General

Roger G. Burlingame
Assistant Attorney General

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I, Roger G. Burlingame, Counsel for Appellee and a member of the bar of this Court, do hereby certify that in accordance with Rule 33, three copies of Appellee's Motion to Dismiss or Affirm were served this day by mailing them, first flass, postage prepaid, to Daniel J. Connolly, Counsel for Appellant, at 41 South Park Street, Hanover, New Hampshire, said address being within 500 miles of the point of mailing.

.....

Roger G. Burlingame
Assistant Attorney General